Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1994

ROBERT GEORGE BURCHILL, Petitioner

vs.

DOUGLAS KISH, et al., Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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33 pp

QUESTIONS PRESENTED

1. Where the issue is raised, do the Fed. R. Civ. P., and related precedent require reinstatement of a complaint, dismissed as the result of a prejudice free, procedural tecnicality, in order that the merits of the matter can be considered?

2. Did the district court deny due process by failing to act regarding a remedial motion concerning complaint reinstatement?

3. Did the court of appeals deny due process when it sanctioned the district court's departure from the accepted and usual course of judicial proceeding, in affirming the lower court's dismissal, to the extent that the Supreme Court's power of supervision is thereby required, as is available thru a Writ of Certiorari?

4. Did the court of appeals, in affirming the lower court's dismissal, render a decision which was in conflict with existing Supreme Court and circuit court of appeals precedents, to the extent that the Supreme Court's power of supervision is thereby required, as is available thru a Writ of Certiorari?

5. Did the court of appeals compromise appellant's constitutional rights when it denied in banc reconsideration, in apparent conflict with Fed. R. App. P. 35(b), and is a Writ of Certiorari the only remedy presently available to accomplish justice?

6. Is there a constitutional need to reconsider this matter consequent to an intervening change in Fed. R. App. P. (a)(4)(F) which was apparently designed to address the involved dilemma?

LIST OF PARTIES

APPELLANT — Robert George Burchill

APPELLEES — Douglas Kish,
Scott R. Rehrig,
Michael Harbove,
Donald K. Macconnell,
Arthur Spitko,
Thomas Toth,
Southwhitehall Police Department,
Southwhitehall Township,
Kelly Waldron,
Robert L. Steinberg,
Lehigh County District Attorney's Office,
Lehigh County,
Allentown Hospital/ Healtheast,
Dr. Paul Gross,

Clyde R. Bower,

John Doe,

Richard Roe,

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RELATED REPORTS

There are no official or unofficial reports of opinions delivered in this case by other courts or administrative agencies, other than those included in the appendix attached hereto.

GROUNDS UPON WHICH THE SUPREME COURT'S JURISDICTION IS INVOKED

i) The judgement sought to be reviewed was entered on 11/12/93.

ii) An order denying rehearing in banc was entered on 12/16/93.

iii) Title 28, U.S.C. §1254(1) is believed to confer jurisdiction upon the Supreme Court.

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgement, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgement, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

Petitioner initiated a federal civil rights action seeking redress for wrongs which took place during or as the result of an arrest which took place in his home, on Mother's Day, 1990. The legality of this matter is under appeal before the Pennsylvania state court system.

At the time of the arrest, an undisclosed number of photographs were taken. Although such action was described later as being the result of exigent circumstances, one individual left, obtained a camera, and thereafter took pictures at will for several hours.

During this time continual searching of the home took place while repeated requests regarding consent to search were made. Such solicitations were accompanied with the warning, "Consent or we'll only get a

judge out of bed, and get a search warrant, anyway."

In addition to this outrageous invasion of privacy, various items of personal property were either taken outright, or confiscated without justification.

After a considerable length of time and without an indication of the reason for the arrest, the unresisting petitioner, who had been alone in the home, was removed in handcuffs and shackles. Transportation to police headquarters and then to a hospital for an unlawful mental commitment followed thereafter.

Petitioner's septuagenarian parents arrived after a total of five armed officers had begun roaming throughout the house. They continued the repeated denial of consent to search.

The officer in charge was then heard humorously speaking into the telephone,

"No search, then its a 302b (mental commitment)". Subsequently, petitioner discovered that falsehoods were used to establish probable cause for a commitment warrant, in clear violation of the Pennsylvania Mental Health Law.

At the hospital, petitioner was forced to remain undressed and shackled in isolation, for three days. Such treatment was supposedly the result of the unavailabilty of regular facilities. Finally, after transfer to another hospital and threatening to get a court order, release was obtained. The involved police personnel had maintained contact with those in charge and importuned against freedom for five days.

During the course of the state proceedings which followed, petitioner was subjected to repeated and unnecessary denials of due process, which petitioner believes are clearly official oppression. Such un-

warranted governmental activities include:

1. appointing defense counsel without notice to petitioner.

2. seeking another unlawful commitment after an appeal was taken.

3. repeated transcription irregularities at each and every stage of the matter.

4. needless and unwarranted issuance of bench warrants.

5. witholding clear exculpatory evidence.

6. being forced to go to trial, at the last minute, with defense counsel, that did not take petitioner's version of the facts, nor engage in any meaningful cross examination regarding the information the prosecution entered.

7. seeking an unconscionable third mental evaluation, immediately upon acquittal, based on a fabricated threat petitioner was supposed to have made in 1990, which is

clearly beyond the 30 day period of the Mental Health Law.

Petitioner filed a federal civil rights action in May of 1992, pursuant to jurisdiction under Title 28 U.S.C. §1343. After approximately 9 months and in excess of 40 docket entries concerning procedural matters, the district court issued an order requiring amendment of the complaint. This order contained explicit instructions, which included admonitions concerning the good faith requirements of verification (Fed. R. Civ. P. 11).

Petitioner served an amendment to the complaint on 4/5/93, the last day of the permitted time period. The same day, the court dismissed petitioner's action because amendment had not been filed.

When petitioner received no response regarding a motion which sought reinstatement of the action, an appeal was filed, in

accordance with Title 28 U.S.C. §1291. The clerk's office indicated that petitioner's subsequent appellate brief had no conclusion. It then related that there was a conclusion but no signed copy, and in any case it was untimely. Petitioner was forced to file a motion with the clerk, regarding the time considerations of Fed. R. Civ. P 26(c), in order to have the appellate brief filed.

Thereafter, the court of appeals summarily adjudged the dismissal affirmed on 11/12/93, and denied suggestion for in banc consideration on 12/16/93. The latter consideration indicates that "other available" judges, rather than all the judges in regular active service, which appears to be required by Fed. R. App. P. 35(b), were involved.

Petitioner believes presentation of the above facts are not impertinent to present review. Their merits are important in eval-

uating the effect of dismissal for non prejudical, technical error, relative to the administration of justice.

ARGUMENT

When petitioner's federal civil rights action was dismissed by the district court for failure to file instead of serve an amendment to the complaint, a right arose to have the matter reinstated.

Petitioner sought to remedy the perfunctory culmination of his only viable means of redress for blatant and egregious civil wrongs, via motion, which was served on 4/17/93. This application requested relief for petitioner's good faith misunderstanding under Fed. R. Civ. P 6(b) as excusable neglect, under Fed. R. Civ. P. 60 as confusion or mistake, and under Fed. R. Civ. P. 1 in the interest of justice. Even though the district court could also have

acted under Fed. R. Civ. P. 59, see infra, no meaningful response was forthcoming and petitioner was forced to appeal the matter.

Although petitioner's brief addressed the lower court's dismissal and failure to act thereon, as abuse of discretion, the issues of injustice relative to such a prejudice free, procedural termination and consequent denial of due process were clearly raised. Petitioner also sought treatment of the problem under Fed. R. Civ. P. 59, which requires a ten day time consideration. As the termination order was entered on 4/7/93, and calculation of the Fed. R. Civ. P. 59 time constraint is controlled by Fed. R. Civ. P. 6(a) and (e), the aforementioned motion service was accomplished within the prerequisite 10 days of dismissal.

Several of the appellees disputed this time determination in their briefs and made unsubstantiated allegations which indicated

that petitioner did not obey court directives. These material misrepresentations appear to be contrary to Fed. R. Civ. P. 11, as well as other ethical standards of professional conduct.

In any case, the court of appeals has full authority to act regarding any matter that is duly raised before it. Title 28 U. S.C. §2106, Bryan v United States, 338 U.S. 552, 94 L. Ed. 335 (1949).

On 11/12/93, the court of appeals adjudged the district court's dismissal affirmed.

The Fedral Rules of Civil Procedure provide for just,speedy and inexpensive determinations. Fed. R. Civ. P. 1. Therefore, dismissal for a mere technicality should not preclude the merits from being brought to light. Foman v Davis, 371 U.S. 178, 83 S.Ct 227, 92 L.Ed.2d 222 (1962), Conley v Gibson, 335 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957),

Hormel v Helvering, 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1037 (1941), Surowitz v Hilton Hotels Corporation, 383 U.S. 363, 86 S.Ct. 845, 15 L.Ed. 807 (1966), Torres v Oakland Scavenger Co., 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d (1988), United States v Hougham, 81 S.Ct. 13, 364 U.S. 310 (1960).

When this right to reinstatement is not recognized, as it was not before both the district court and the court of appeals, petitioner is also denied due process of law.

Fundamental due process requires a fair and meaningful hearing. Boddie v Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L. Ed. 113,(1971). Without allowance of petitioner's amended complaint there can be no right to any hearing which necessarily includes the right to file pleadings. Holt v Commonwealth of Virginia, 381 U.S. 131, 85 S.Ct. 1375, 14 L.Ed.2d 290 (1965).

Due process is the constitution's em-

bodiment of society's conception of just legal principles as are found thru application of the 5th and 14th Amendments to problem situations. U.S. Const. amend. V,XIV. Petitioner believes that preventing the merits of this matter (see Statement of the Case, supra) from proper legal course for a benign error is clearly a violation of due process. Lassiter v Department of Social Services, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed. 2d 640 (1981).

When the court of appeals failed to act regarding the Fed. R. Civ. P. 59 considerations petitioner raised during the involved appeal, its order was contrary to decisions of the Honorable Court and decisions of other courts of appeal as well. Osterneck v Ernst & Whinney, 489 U.S. 169, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989), Griggs v Provident Consumer Discount Co., 459 U.S. 56, 193 S.Ct. 400, 74 L.Ed.2d 225 (1982), Foman v Davis,

371 U.S. 178, 83 S.Ct. 227, 92 L. Ed.2d 222 (1962), Rosen v Rucker, 905 F.2d 702 (1990), New Castle County v Hertford Accident and Indemnity Company, 933 F.2d 1162 (1991), Rados v Celotex Corp., 809 F.2d 170 (1986), Skagerberg v Oklahoma, 797 F.2d 881 (1986), Finch v. City of Vernon, 845 F.2d 256 (1988).

The aforestated cases support the proposition that petitioner's timely post judgement motion, no matter what its nomenclature, should have been treated as a Fed. R. Civ. P. 59(e) motion, which necessarily stayed any appeal in this matter, pursuant to Fed. R. App. P. a(4)(C), until the district court could determine the said motion. See Osterneck v Ernst, supra, where the Supreme Court elucidated a standard for determining which timely post judgement motions qualify for this consideration. Apparently, only those motions which involve

consideration of matters salient to, and not collateral to, a judgement on the merits below, will be so classified.

In this light, because the district court has handled such matters with other than perfunctory dismissal, petitioner did not receive equal protection of the law. Delgado v McTighe, 522 F. Supp. 886 (1981).

Petitioner believes there was a similar denial when rehearing was sought before the court of appeals, in banc. It appears, same was denied through submittal to all available judges in regular active service rather than all judges in regular active service pursuant to Fed. R. App. P. 35(b). See Appendix C. As a result, petitioner was not afforded the ability to present information regarding possibly misconstrued aspects of this matter, via rehearing, as all other similarly situated litigants might.

The court of appeals also refused to grant a stay pending this application, indicating that such stay would not be required because there were no substantiative rights being compromised. Thereafter petitioner was forced to respond to the clerk's taxing of costs. Such activity appears, at minimum to chill the right to seek the present review.

Fed. R. App. P. (a)(4)(F) has been amended and its effective date was 12/1/93. If this amendment is applied under Fed. R. Civ. P. 86, resolution of this matter may be obtained by treating the Fed. R. Civ. P. 60, district court motion as a Fed. R. Civ. P. 59 motion (see supra). Such intendance would appear to reconcile previously considered due process concerns. Walling v Reuter, Inc. 321 U.S. 671, 64 S.Ct. 826, 88 L.Ed. 1001 (1944).

RESPECTFULLY SUBMITTED:

Attorney R.G. Burchill

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215-434-2101

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 93-1438

ROBERT GEORGE BURCHILL,

Appellant

v.

DOUGLAS KISH, et al.,

Appellees

JUDGEMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that the judgement of the district court entered April 6, 1993, be and the same is hereby affirmed.

Costs taxed against appellant.

By the Court,

(s) Walter K. Stapleton

Circuit Judge

APPENDIX A

DATED: NOV 12 1993

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NO. 92-2776

ROBERT GEORGE BURCHILL,

Appellant

v.

DOUGLAS KISH, et al.,

Appellees

ORDER

AND NOW, this 5th day of April, 1993, the Court having previously dismissed all defendants by an annotated Order of February 22, 1993 with a notation that "any causes of action not reasserted in an Amended Complaint within twenty-one (21) days will be deemed dismissed with prejudice," and the Court having issued an Order on March 9, 1993 granting plaintiff's motion to enlarge time, which Order granted an additional twenty-one (21) day period of time from March 9, 1993 for the filing of an A-

mended Complaint with the express notation that "plaintiff's Amended Complaint shall be filed within twenty-one (21) days of the date of this Order or this case will be dismissed with prejudice," and it appearing that no such Amended Complaint has been filed, NOW THEREFORE, the dismissals of February 23, 1993 are hereby deemed to be with prejudice and this case is DISMISSED WITH PREJUDICE AS TO ALL DEFENDANTS AND CLOSED.

BY THE COURT

(S) Franklin S. Van

Antwerpen, U.S.D.J.

ENTERED: 4-6-93

CLERK OF COURT

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 93-1438

ROBERT GEORGE BURCHILL,

Appellant

v.

DOUGLAS KISH, et al.,

Appellees

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

APPENDIX C

By the Court,

(s) Walter K. Stapleton

Circuit Judge

Dated: DEC 16 1993